Petition

81-569

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ALEXANDER L. STEVAS,
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No. A-106

IN THE SUPREME COURT

OF THE UNITED STATES OF AMERICA

October 1981 Term

DOROTHY COLE,

Petitioner,

v.

THE UNITED STATES,
STATE OF INDIANA, and
SOIL SYSTEMS OF INDIANA, INC.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI

from the UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Charles S. Gleason, Attorney of Record
for Petitioner, GLEASON, HAY & GLEASON
8780 Purdue Road, Suite Two
Indianapolis, Indiana 46268

(317) 875-6617

QUESTIONS PRESENTED FOR REVIEW

1. Whether the attempted Congressional exemption from following prescribed land title recordation procedures of the States and the reliance upon that Congressional Act by the United States does violence to the reserved rights, duties and obligations of the States so as to effectively interfere with the orderly function of the internal affairs of the State.

2. Whether the condemnation of title, together with legislative prescription of administrative terms defining offenses thereon, provisions for arrest by U. S. Marshal, hearings before U. S. District Court Judges, fines and penalties to be paid to the United States, removal from State tax rolls, ousting of State Court Jurisdiction as to injunctions against common criminal trespass, is the "exclusive jurisdiction" as contemplated within the language of State Statutes[1].

---

1 IC 4-21-2-1 and IC 32-11-1 *et seq* and 32-11-1-11. See also Ill. Rev. Stat. 1971, Ch. 143 §§ 4-6

3. Whether the holdings of the U. S. District Court for the Southern District of Indiana and the U. S. Court of Appeals for the Seventh Circuit herein have preempted and forever barred the right reserved to States to initially interpret State Statutes.

4. Whether the attempted enlargement of the Navigable Servitude along the Ohio River in condemnation suits instituted by the United States District Courts is an attempted[2] acquisition of such exclusive jurisdiction as to have constituted a *prima facie* Civil Rights[3] violation of all Litigants therein.

5. Whether the undisputed facts in the instant case establish a *prima facie* case of violation of this Litigant's Civil Rights[4].

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2 Although unauthorized either by Congress or the State Legislature
3 Fifth Amendment, U.S. Constitution
4 Fifth Amendment, U.S. Constitution

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REFERENCE TO OPINION

The Plaintiff's State Court suit was for injunctive relief citing an unauthorized attempted take (Appendix A) and was removed by Petition (Appendix B) to the U. S. District Court. The U. S. District Court after removal dismissed on the grounds of sovereign immunity. The Seventh Circuit Court of Appeals affirmed that decision (Appendix C).

JURISDICTION OF THE COURT

Plaintiff's claim is for injunctive relief from unlawful trespass, a crime under Indiana Code.

Plaintiff's contention was that the attempted take some seven (7) years earlier had been without Congressional authorization, in an unauthorized forum, contrary to Indiana Code and abandoned.

(i) Date of Petition for Removal to be reviewed and the time of its entry is *May 20, 1980*. (Appendix B)

(ii) Date of Amendment to Petition for Removal to be reviewed and the time of its entry is *May 22, 1980.* (Appendix D)

(iii) Date of Second Amendment to Petition for Removal to be reviewed and the time of its entry is *June 22, 1980.* (Appendix E)

(iv) Date of the Dismissal Judgment and Decree and Memorandum to be reviewed and the time of its entry is *July 16, 1980.* (Appendix F)

(v) Date of the Seventh Circuit Court of Appeals Judgment and Decree to be reviewed and the time of its entry is *March 11, 1981.* (Appendix C)

(vi) Date of Order of The Supreme Court enlarging the time for the filing of this Petition For Writ of Certiorari to and including September 18, 1981 was *August 6, 1981.* (Appendix G)

(vii) Statutory provision believed to confer jurisdiction on The Supreme

Court to review the judgment or decree is 28 U.S.C. § 1254(1), and Rules of The Supreme Court, Rule 17.1 (a) and (c).

STATUTES INVOLVED

First Article of the Constitution of the United States, 17th Clause of the 8th Section.

Amendment Five, Constitution of The United States of America.

Amendment Ten, Constitution of The United States of America.

28 U.S.C. § 1441(a)

28 U.S.C. § 1442

Indiana Code

IC 4-21-2-1

IC 4-21-4-1

IC 4-21-4-2

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IC 18-5-1-4

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IC 35-43-2-2

STATEMENT OF THE CASE

Petitioner owns land adjacent to the Ohio River. The U. S. Corps of Engineers without Congressional Authorization filed a Declaration of Take in the District Court, totally ignoring State law, even to this day.

Indiana, upon admission to the Union, reserved jurisdiction to prescribe the terms by which the United States could acquire exclusive jurisdiction within its geographic bounds as allowed by First Article of the Constitution of The United States, 17th Clause of the 8th Section, and this reservation as clarified in the 10th Amendment of the Constitution of The United States.

Pursuant to these reserved rights Indiana enacted in 1877 what is now known

as Indiana Code §§ IC 4-21-2-1 *et seq*, IC 4-21-4-1, IC 4-21-4-2, IC 4-21-4-3. These ancient Statutes have never been tested in the Indiana Courts. Comparative legislation in Illinois has never been tested in the Illinois Courts.

The U. S. District Court held that 28 U.S.C. § 1441(a) authorized removal of this Petition For Injunction from State Court. Plaintiff contends that such an interpretation precludes and forever bars an interpretation by State Courts of their own Statute.

The District Court then held that the State Statute was inapplicable to the facts in this case because, it reasoned, that only bare title was acquired and not exclusive jurisdiction. Petitioner believes the interpretation of the particular section of the Indiana Code by the Indiana Supreme Court or any Court would be that

acquisition of title shall be only with accompanying exclusive jurisdiction, and then only for the duration of the period of use for the limited purposes acquired.

Petitioner further contends that:

(a) The United States did on one occasion cause a United States Marshal to make an arrest thereon, the United States Attorney filed criminal charges with the United States District Court, filed Contempt charges against an alleged trespasser, James Cole, who claims no title in this land and is not a party to this litigation.

(b) Prior to filing the Declaration of Take the U. S. Corps of Engineers entered into an agreement to lease to the State of Indiana the land at issue for twenty-five (25) years. It remains unused for any purpose.

(c) The United States of America contends the State of Indiana had no rights save those provided in the lease.

The undisputed facts are that the United States of America exercised exclusive jurisdiction, *i.e.*, all that jurisdiction encompasses, legislative, juridicial and administrative.

Therefore, the United States by its conduct ratified intent to acquire exclusive jurisdiction while contending that it acquired nothing under State Law and only "bare title" under 40 U.S.C. 258(a).

"The Record" below is devoid of any semblance of Due Process.

Due Process is an innate ingredient of any alleged Eminent Domain proceedings, Sovereign Immunity notwithstanding. Amendment Five, Constitution of The United States of America.

FEDERAL JURISDICTION

Federal Jurisdiction in the first instance was challenged and Plaintiff was

enjoined by District Court Order from any further proceeding in any Court, State or Federal, except for Appeal from the final judgment and decree.

ARGUMENT FOR ALLOWANCE

The Seventh Circuit Court of Appeals has so far sanctioned a departure from the accepted and usual course of judicial proceedings by allowing:

(a) Denial of access to State Court jurisdiction for interpretation of a State reserved right;

(b) Acquisition and exercise of "exclusive jurisdiction" through unauthorized Federal procedures;

(c) Fraud upon the Court and Petitioner;

(d) Use of an uncertified padded record;

The practice follows a pattern which is widespread in both Indiana and Illinois and possibly other States and involves many litigants;

This is the first case wherein the Circuit Court of Appeals upon finding of no removal jurisdiction failed to remand to the State Court.

WHEREFORE, this outrageous conduct calls for the exercise of this Court's power of supervision.

Respectfully submitted this _____ day of September, 1981.

_____

Charles S. Gleason
Attorney for Petitioner

Of counsel:

GLEASON, HAY & GLEASON
8780 Purdue Road, Suite 2
Indianapolis, Indiana 46268

(317) 875-6617

STATE OF INDIANA	)	IN THE CIRCUIT COURT
	) SS:	
COUNTY OF CRAWFORD	)	OF CRAWFORD COUNTY

DOROTHY COLE, Plaintiff	)	
v.	)	CAUSE NO. 80-C-69
UNITED STATES OF AMERICA, STATE OF INDIANA, and SOIL SYSTEMS OF INDIANA, INC., Defendants.	)	

APPLICATION FOR PRELIMINARY INJUNCTION

1. The Plaintiff is an individual resident of the State of Indiana, County of Crawford, and title owner of record of the disputed property, as per EXHIBIT "D":

2. Defendant United States of America, whose principle office is in Washington, D. C., but is trespassing thereupon in the State of Indiana; Defendant State of Indiana whose principle office is in the City of Indianapolis, Indiana, but is trespassing in the County of Crawford, State of Indiana;

3. On May 13, 1980 at 9:00 a.m. all defendants are trespassing on plaintiff's property without just cause, having failed to

conform to Indiana Code 4-21-4-1 and Indiana Code 4-21-4-2 (H. I.), copies of which are attached hereto as Exhibit "A".

4. Plaintiff has no adequate remedy at law or otherwise for the harm or damage of trespass and disruption of turf and soil by defendants because defendants allege she has no ownership, as evidenced by alleged condemnation in the U. S. Federal Court, and further because under IC 4-21-4-1 and IC 4-21-4-2 and in accordance with the 17th clause of the 8th section of the First Article of the Constitution of the United States all defendants are without authority to trespass upon private property of the plaintiff.

5. Plaintiff will suffer irreparable damage herein and injury unless the acts and conduct of the defendants above complained of are enjoined because defendants deny her right, title and interest, as

shown by her title of record and the trespass, disturbance of turf and soil by the defendants.

WHEREFORE, Plaintiff prays as follows:

1. That a temporary restraining order issue restraining defendants, their servants and employees from trespassing upon, entering or otherwise damaging the property of the plaintiff until a hearing is had on plaintiff's application for preliminary injunction.

2. That a preliminary injunction issue enjoining defendants, their servants and employees from entering upon, trespassing, disturbing turf and soil of the plaintiff's property identified as Tract 4000, during the pendency of this action.

3. That on final hearing defendants, their servants, agents and employees be permanently enjoined from trespassing,

entering upon, disturbing the turf and soil of the plaintiff's property.

4. That plaintiff receive costs and expenses incurred herein.

5. That plaintiff receive such other relief as may be adjudged just and equitable to the Court.

/s/ Dorothy Mallen Cole
/t/ Dorothy Cole

VERIFICATION

I affirm under penalties for perjury, that the foregoing representations are true.

/s/ Dorothy Mallen Cole
/t/ Dorothy Cole

Dated: 5/13/80

/s/ Charles S. Gleason
/t/ Charles S. Gleason
Attorney for Dorothy Cole

Of Counsel:
GLEASON, HAY & GLEASON
1755 Indiana Bank Tower
One INdiana Square
Indianapolis, IN 46204 (317) 635-5180

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

NEW ALBANY DIVISION)
)
DOROTHY COLE,)
)
Plaintiff,)
)
v.) No.
)
UNITED STATES OF AMERICA,) NA 80-73-C
)
STATE OF INDIANA, and)
)
SOIL SYSTEMS OF INDIANA, INC.)

Defendants.

PETITION FOR REMOVAL

To: The Honorable Judge of the United States District Court for the Southern District of Indiana:

Petitioner, United States of America, by counsel, respectfully prays that the above captioned cause now pending in the Crawford Circuit Court be removed therefrom to this Court, under the provisions of Title 28, United States Code Sections, 1441-42 and 1446.

In support thereof, petitioner would show the Court as follows:

APPENDIX " B"

1. On or about May 13, 1980, the following pleadings were filed, purportedly on behalf of one Dorothy Cole, in Cause No. 80-C-69, Crawford Circuit Court:

A. Application for Preliminary Injunction;

B. Notice of Motion for Application of (sic) Preliminary Injunction;

C. Affidavit in Support of Motion for Preliminary Injunction.

On May 13, 1980, the Honorable Scott T. Miller, Judge, Crawford Circuit Court, scheduled the cause for hearing on the Application for Preliminary Injunction on May 21, 1980, at 9:30 a.m. This Order was duly entered upon the Civil Docket.

Each of the documents referred to in the preceding paragraph are attached to this petition and incorporated as a part thereof.

2. Dorothy Cole claims fee title to a parcel of land known as Tract 4000, allegedly located in Crawford County Indiana. Dorothy Cole apparently claims title in

part under Article I, Section 8, of the Constitution of the United States, and seeks to exclude the United States, the trueowner, from possession. Application ¶4. Pursuant to 28 U.S.C. §1346 (f) and 2409a, jurisdiction over such an action may lie in this court. The action is therefore removable under 28 U.S.C. §1441 (a).

Furthermore, any decree entered in this cause would work upon federal officers acting under color of office, rendering the action removable pursuant to 28 U.S.C. §1442(a) (1). Plaintiff has purportedly directed notice of this action to the Army Corps of Engineers, an agency of the United States of America.

3. This action is removable by the defendant at this time to this District Court under Title 28, United States Code, Sections 1441-42 and

1446. No removal bond is required under Title 28, United States Code, Section 1446(d).

WHEREFORE, petitioner prays that this action be removed to federal district court.

Respectfully submitted,

VIRGINIA DILL McCARTY
United States Attorney

By: Bradley L. Williams
Assistant Unites States Attorney

STATE OF INDIANA)
)
COUNTY OF MARION)

Bradley L. Williams, being first duly sworn upon his oath deposes and says that he is an Assistant United States Attorney in and for the Southern District of Indiana, that he makes this affidavit for and on behalf of the United States of America and that the allegations in the foregoing Petition for Removal are true as he is informed and verily believes.

Bradley L. Williams

Assistant United States Attorney

Subscribed and sworn to before me, a notary public, this 19th day of May, 1980.

Notary Public

My Commission expires:

August 31, 1981

My County Residence:

Marion

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing Petition for Removal upon the Plaintiff herein, by mailing a copy thereof to counsel of record, William H. Andrews, P.O. Box 1234, Bloomington, Indiana 47402, Attorney for Soil Systems of Indiana, Inc., Jack Watson, Deputy Attorney General, 219 State House, Indianapolis, Indiana 46204, hand delivery to Charles S. Gleason

One Indiana Square, Suite 1755, Indianapolis, Indiana 46204, on this 20 day of May, 1980.

Bradley L. Williams

Assistant United States Atty.

Office of The United States Attorney
Room 274, United States Courthouse
46 East Ohio Street
Indianapolis, Indiana 46204
Telephone: 317-269-6333
FTS Telephone: 331-6333

APPENDIX "B" (cont'd)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 80-2021
DOROTHY COLE,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, STATE OF INDIANA, and SOIL SYSTEMS OF INDIANA, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, New Albany Division. No. NA 80-C-73-- James E. Noland, Judge.

ARGUED FEBRUARY 9, 1981--DECIDED MARCH 11, 1981*

Before FAIRCHILD, Chief Judge, and SWYGERT and BAUER, Circuit Judges.

PER CURIAM. This appeal is the latest in a series of attempts by plaintiff over the

*This appeal was originally decided by unreported order on March 11, 1981. See Circuit Rule 35. The Court has subsequently decided to issue the decision as an opinion.

past fifteen years to ignore a condemnation by the United States of a parcel of land owned by plaintiff and her husband. The parcel, designated Tract No. 4000 in the proceeding, is located in Crawford County, Indiana.

On May 12, 1980 plaintiff filed an "Application for Preliminary Injunction" against the United States, the State of Indiana, and the Soil Systems of Indiana, Inc. in the Crawford Circuit Court, alleging in pertinent part:

> On May 13, 1980. . . all defendants are trespassing on plaintiffs' property without just cause, having failed to conform to Indiana Code 4-21-4-1 and Indiana Code 4-21-4-2. . . . Plaintiff has no adequate remedy at law or otherwise for the harm or damage of trespass and disruption of turf and soil by defendants because defendants allege she has no ownership, as evidenced by alleged condemnation in U.S. Federal Court. . . .

Attached to that petition was an affidavit which stated:

> That the land title records of Crawford County, State of Indiana, show title free and clear to the Plaintiff, and that the *lis pendens* notice filed of condemnation by the United States of America failed to comply with the jurisdictional requirement of IC 4-21-4-1 and IC 4-21-4-2; NA 66-C-40 lacking jurisdiction.

On May 20, 1980 the United States Attorney

filed a petition in the United States District Court for the Southern District of Indiana to remove the suit to that court.* Simultaneously he moved to dismiss the suit and notified plaintiff's counsel of his action. The latter entered his appearance but did not respond to the motion. In spite of the removal, plaintiff sought to press her suit in the state court.

On July 16 the federal court granted the motion to dismiss. After noting that the United States is the "sole and exclusive owner" of the land involved in this action, the court enjoined the plaintiff from interfering with the Government's possession. Cole was enjoined from any further attempts to activate the instant action in the state court and from the future institution of any similar actions. Plaintiff appeals from both the judgment of dismissal and the injunctive order.

* On June 11, 1980 codefendants State of Indiana and Soil Systems of Indiana, Inc. filed written consent to the removal.

I

The background facts leading to the present suit are as follows. On June 2, 1966 the United States began a condemnation proceeding in the federal district court to acquire several parcels of land in Crawford County, including the parcel owned by plaintiff and her husband. With its complaint, the Government filed a declaration of taking pursuant to 40 U.S.C. §258a and deposited a sum of money with the clerk of the court as estimated just compensation. The court ordered that immediate possession of land be given to the United States.

No objection was asserted by the Coles to the taking. They appeared by counsel, however, and requested a trial by jury. The request was granted. The jury found just compensation for the Cole property was $2,100 and judgment was accordingly entered for that amount. The judgment contained the following language, "The title to the estate set forth in the Declaration of Taking in the land described herein as Tract No. 4000 is vested

in the United States of America." There was no appeal from the judgment.

Over the following years, the Coles made sporadic attempts to interfere with the Government's possession of the condemned parcel. The Government sought and was granted several writs of assistance, and two contempt citations were issued against the Coles. The present suit is the latest effort to assert some sort of dominion over the land which they formerly owned.

II

On appeal plaintiff contends that the removal of her suit to the federal district court was improper and that the state court continues to have jurisdiction over the action. We do not agree.

The Judicial Code, 28 U.S.C. § 1441(a), provides that a civil action brought in a state court of which the district courts of the United States have original jurisdiction may be removed by the defendant to

the district court of the United States. Another section of the Code, 28 U.S.C. § 1441(b), provides that the district courts shall have original jurisdiction of all civil actions wherein the matter in controversy arises "under the Constitution or laws of the United States. There can be no doubt that section 1441(b) is applicable to the situation presented by this case.

Aside from the fact that plaintiff's suit implicitly questions the validity of the condemnation proceeding which was instituted under the laws of the United States, plaintiff's application for injunctive relief contains the following specific language:

> Plaintiff has no adequate remedy at law or otherwise for the harm or damage of trespass and disruption of turf and soil by defendants because defendants allege she has no ownership, as evidenced by alleged condemnation in the U.S. Federal Court, and further because under IC 4-21-4-1 and IC 4-21-4-2 and in accordance with the 17th clause of the 8th section of the First Article of the Constitution of the United States all defendants are without authority to trespass upon private property of the plaintiff.

Because the United States Constitution is invoked there can be no question that section 1441(b) permitted removal.

III

It is frequently, if not axiomatically, said that subject matter jurisdiction on removal is derivative. If the state court where the suit originated was without jurisdiction, the federal court acquires none upon removal. *Lambert Run Coal Co. v. Baltimore & Ohio RR Co.*, 258 U.S. 377 (1922).

The thrust of plaintiff's claim is that the United States and its codefendants have been trespassing upon her land "without just cause." We know of no statute by which state courts have authority to adjudicate claims of trespass against the United States. Congress has not agreed that the United States or its officers may be sued over a claim of that nature. It is a basic tenet of constitutional law that, "[The United States] is immune from suit save as it consents to

be sued. . . . [A]nd the terms of its consent to be sued in any court define that Court's jurisdiction to entertain the suit," *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (citation omitted). A party who sues the United States has the burden of pointing to a congressional act that gives consent. *Malone v. Bowdoin*, 369 U.S. 643 (1962). Plaintiff failed to meet her burden.

It may be noted that 28 U.S.C. § 2409a does not authorize suits against the United States in federal courts which are brought to quiet title in a claimant. Plaintiff concedes that that section is inapplicable here.

We hold that this suit is barred by sovereign immunity and hence was properly dismissed.

IV

We turn to another aspect of this case: the injunctive orders issued against the Plaintiff. We begin by noting that contemporaneous only with the petition for removal, Government counsel filed a motion to consolidate the removal suit with the original

condemnation proceeding, No. NA 66-C-40, captioned *"United States v. 87.67 Acres of Land, et al."* In that motion counsel alleged in part:

> This action and No. NA 66-C-40 arise out of the condemnation of Tract No. 4000 as part of the Cannelton Lock & Dam project. Defendant United States contends that the present action is brought by plaintiff in an attempt to wrongfully disturb the United States in its possession of Tract No. 4000, title to which was acquired by virtue of NA 66-C-40. In a Motion to Dismiss this day filed, the United States contends that the judgment in NA 66-C-40, Tract No. 4000 is a bar to maintenance of this action. . . .
>
> Both actions arise from the Declaration of Taking Act, 40 U.S.C. § 258a. . . .
>
> In NA 66-C-40, Tract No. 4000, the United States has this day filed a motion for ancillary proceedings, to wit: a contempt citation against James Cole and Dorothy Cole, contending that the filing of the present cause, and other acts constitute a deliberate attempt to disobey previous orders of court entered in No. NA 66-C-40 on September 8 and 23, 1975.

The record does not reflect that any action was taken by the district court. It is apparent, however, that the court treated the motion as a proper request

and proceeded accordingly. The district judge in a memorandum decision, after reciting the essential facts underlying the judgment entered in the condemnation proceeding, concluded as follows:

> Clearly Dorothy Cole may not relitigate the issue of title to Tract No. 4000 in the Crawford Circuit Court or this court in view of the final judgment in Cause No. NA 66-C-40.
>
> Plaintiff asserts no independent claim against the State of Indiana or Soil Systems of Indiana; rather, their liability is premised solely upon the State's lease of the tract from the United States, and Soil Systems' apparent contract with one of the defendants. Clearly, no claim is stated, and all defendants are entitled to dismissal.
>
> Based upon the foregoing, defendant United States of America's Motion to Dismiss is GRANTED.

Subsequently, the district court entered a final judgment and order in which the instant action was ordered dismissed with prejudice and "pursuant to 28 U.S.C. § 1651(a) the injunctive relief heretofore described was granted the United States." Section 1651(a) of the Judicial Code, the All Writs Statute, was properly applied in this case.

Ancillary relief to preserve and protect a prior judgment is eminently proper in a situation such as presented here.

The judgment and order are affirmed.

A true Copy:

Teste: _____
Clerk of the United States
Court of Appeals for the
Seventh Circuit

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

NEW ALBANY DIVISION

DOROTHY COLE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. NA
	)	
UNITED STATES OF AMERICA,	)	80-73-C
	)	
STATE OF INDIANA, and	)	
	)	
SOIL SYSTEMS OF INDIANA, INC.,	)	
	)	
Defendants.	)	

AMENDMENT TO PETITION FOR REMOVAL

Defendant United States of America, by counsel, pursuant to Fed. R. Civ. P. 15 and 28 U.S.C. §1653, herewith amends its Petition for Removal, heretofore filed on May 20, 1980, by adding to numbered paragraph 2 thereof the following additional ground for removal of this cause:

Plaintiff's cause of action depends upon an adjudication of title to Tract No. 4000. Actions for quiet title

against the United States in the state courts are governed by 28 U.S.C. §1444. Defendant United States of America would further show that its petition for removal is amendable at this time. Willingham v. Morgan, 395 U.S. 402 (1969); Winters Govt. Secur. v. Nafi Emp. Credit, 449 F. Supp. 239 (S.D. Fla. 1978).

Virginia Dill McCarty
United States Attorney

By: _____
Bradley L. Williams
Assistant United States Atty.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing AMENDMENT TO PETITION FOR REMOVAL upon the plaintiff herein, by mailing a copy thereof to counsel of record, William H. Andrews, P.O. Box 1234, Bloomington, Indiana, 47402, Attorney for Soil Systems of Indiana, Inc., Jack Watson, Deputy Attorney General, 219

State House, Indianapolis, Indiana, 46204, and Charles S, Gleason, One Indiana Square, Suite 1755, Indianapolis, Indiana 46204, on this 22 day of May, 1980.

Bradley L. Williams

Assistant United States Atty.

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46 East Ohio Street
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Telephone: 317-269-6333
FTS Telephone: 331-6333

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

NEW ALBANY DIVISION

DOROTHY COLE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	NO. NA
	)	
UNITED STATES OF AMERICA,	)	80-73-C
	)	
STATE OF INDIANA, and	)	
	)	
SOIL SYSTEMS OF INDIANA, INC.,	)	
	)	
Defendants.	)	

SECOND AMENDMENT TO PETITION FOR REMOVAL

Defendant United States of America, by counsel, pursuant to Fed. R. Civ. P. 15 and 28 U.S.C §1653, herewith amends its Petition for Removal, heretofore filed on May 20, 1980, by adding to numbered paragraph 2 thereof the following additional grounds for removal of this cause:

In paragraph 4 of her Application for Preliminary Injunction, plaintiff alleges that the United States "occupies"

APPENDIX "E"

her property without authority, allegedly in violation of Article I, Section 8, clause 17 of the United States Constitution. Assuming for the moment that plaintiff has stated a claim upon which relief may be granted, her claim thus depends upon the construction of a portion of the Constitution. Plaintiff's claim therefore arises under the Constitution, and is removable under 28 U.S.C. §§1331 and 1441(a) .

In the same paragraph 4, plaintiff refers to an "alleged condemnation in U.S. Federal Court." The records of this court in Cause No. NA 66-C-40, which are the subject of judicial notice, reflect that title to Tract No. 4000 vested in the United States by virtue of that litigation, to which Dorothy Cole was a party. Plaintiff's claim thus arises under the Declaration of Taking Act, 40 U.S.C. §258a, under which authority, among others, Tract No. 4000 was taken. See Higginson v. United States, 384 F.2d 504 (5th Cir. 1967).

Removability is established by 28 U.S.C. §§1331 and 1441(a).

Defendant United States of America would further show that its petition for removal is amendable at this time. Willingham v. Morgan, 395 U.S. 402 (1969); Winters Govt. Secur. v. Nafi Emp. Credit, 449 F. Supp. 239 (S.D. Fla. 1978).

VIRGINIA DILL McCARTY
United States Attorney

By: _____
Bradley L. Williams
Assistant United States Attorney

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

Bradley L. Williams, being first duly sworn, upon his oath deposes and says that he is an Assistant United States Attorney in and for the Southern District of Indiana, that he makes this affidavit for and on behalf of the United States of America and that the allegations in the foregoing SECOND AMENDMENT

TO PETITION FOR REMOVAL are true as he is informed and verily believes.

Bradley L. Williams
Assistant United States Attorney

Subscribed and sworn to before me, a notary public, this 12th day of June, 1980.

Dierdre E. Endsley
Notary Public

My Commission Expires:

August 31, 1981

My County of Residence:

Marion

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing SECOND AMENDMENT TO PETITION FOR REMOVAL, upon the plaintiff herein, by mailing a copy thereof to counsel of record, William H. Andrews, P.O. Box 1234, Bloomington, Indiana 47402, Attorney for Soil Systems of Indiana, Inc., Jack Watson, Deputy Attorney General, 219

State House, Indianapolis, Indiana 46204, and Charles S. Gleason, One Indiana Square, Suite 1755, Indianapolis, Indiana 46204, on this 12th day of June, 1980.

Bradley L. Williams
Assistant United States Attorney

Office of the United States Attorney
Room 274, United States Courthouse
46 East Ohio Street
Indianapolis, Indiana 46204
Telephone: (317) 269-6333
FTS Telephone: 331-6333

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

NEW ALBANY DIVISION

DOROTHY COLE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. NA-80-73-C
	)	
UNITED STATES OF AMERICA,	)	
STATE OF INDIANA, and	)	
SOIL SYSTEMS OF INDIANA, INC.	)	
	)	
Defendants.	)	

JUDGMENT AND ORDER

In accordance with its Memorandum of Decision this day entered,

IT IS ORDERED, ADJUDGED AND DECREED that this action be DISMISSED with prejudice.

Pursuant to 28 U.S.C. §1651(a), the Court NOW ORDERS:

1. The United States is the sole and exclusive owner in fee simple of Tract No. 4000, Crawford County, Indiana.

2. Plaintiff Dorothy Cole, her heirs

and assigns, and any persons acting on her behalf, including her representatives and her attorneys, are ENJOINED from participating further, in any way, in a cause of action formerly pending in Crawford Circuit Court under Cause No. 80-C-69. Specifically, they shall request no further action or ruling by the Crawford Circuit Court, and they shall attend no further proceedings, should any be scheduled.

4. Plaintiff Dorothy Cole, her heirs and assigns, and any persons acting on her behalf, including her attorneys, are hereby ENJOINED from filing any further civil actions or requests for injunctive relief arising from the transactions and occurrences which are the subject matter of this action, in any court, state or federal.

5. Nothing in this order shall be construed to preclude an appeal of the judgment rendered herein to the United States Court of Appeals for the Seventh Circuit.

Costs are awarded to defendants.

DATED this 16th day of July, 1980.

James E. Noland
U.S. District Judge

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF INDIANA

NEW ALBANY DIVISION

DOROTHY COLE,	)	
	)	
Plaintiff,	)	
	)	
Vs.	)	No. NA 80-73-C
	)	
UNITED STATES OF AMERICA,	)	
STATE OF INDIANA, and	)	
SOIL SYSTEMS OF INDIANA, INC.,	)	
	)	
Defendants.	)	

MEMORANDUM OF DECISION

This cause came before the Court on the Petition for Removal and Motion to Dismiss filed by defendant United States of America on May 20, 1980; said cause having been removed from Crawford Circuit Court to this court on May 20. Plaintiff has failed to respond to defendant United States of America's Motion to Dismiss; nor filed any other pleading despite the time limitations provided in Local Rule 8(a). The Court therefore makes the following ruling:

On May 13, 1980, plaintiff filed her "Application for Preliminary Injunction" against the United States of America, the State of Indiana, and Soil Systems of Indiana, Inc. Plaintiff therein claimed that defendants were trespassing upon her property which was condemned for the use of the United States in 1966, and which was described as Tract No. 4000, Crawford County, Indiana. In her application and affidavit, plaintiff claims that Tract No. 4000 was improperly condemned, in that Art. I, Sec. 8, cl. 18 of the Constitution, and Ind. Code §§4-21-4-1 and -2 were not followed. Plaintiff makes no showing that these provisions are jurisdictional limitations on the right of the United States to acquire lands.

It is well established that the federal power of eminent domain, being an aspect of sovereignity, cannot be infringed by the states. James v. Dravo Contracting Co., 302 U.S. 134 (1937). Art. I, Sec. 8, cl. 17 of the Constitution does not alter this power,

as it applies only where the United States acquires not only title but "exclusive legislation," that is, exclusive jurisdiction, Dravo, supra, over the lands obtained. The quoted Indiana Statutes are consistent with this rule, in that they operate to cede "exclusive jurisdiction" over the lands acquired under their provisions. Article I has no effect on the acquisition of mere title to lands, nor have Ind. Code §4-21-4-1 and -2. Dravo, supra; 1 Nichols' The Law of Eminent Domain, §2.131[1], at 2-44 (J. Sackman Rev. 2d ed. 1973).

The simple fact is that the United States did not acquire title to Tract No. 4000 under Indiana law. This Court takes judicial notice of its records in Cause No. NA 66-C-40, in which Tract No. 4000 was condemned. In that cause, declaration of taking was filed, pursuant to 40 U.S.C. §258a, on June 2, 1966, setting out federal law as authority for the taking. By virtue of section 258a title vested in the United

States on that date. United States v. Dow, 357 U.S. 17 (1958). The record in Cause No. NA 66-C-40 reflects that the landowners of Tract No. 4000, Berney and Corothy Cole, filed no objection to the taking of Tract No. 4000, and the objections were therefore waived as a matter of law. Fed. R. Civ. P. 71A(e). Therefore, the case proceeded to trial on the issue of just compensation. On January 19, 1968, the jury returned a verdict in the amount of $2,100, which was distributed to the Coles but which has not been accepted by the landowners. This has no effect on title to the property, however,

On February 7, 1968, this Court entered judgment on the verdict, noting in paragraph 7 thereof that:

> ...title to the estate set forth in the Declaration of Taking in the land described herein as Tract No. 4000 is vested in the United States of America.

The Coles took no appeal. Nor have they filed a Rule 60 motion to reopen or set aside the judgment.

Clearly Dorothy Cole may not relitigate the issue of title to Tract No. 4000 in the Crawford Circuit Court or this court in view of the final judgment in Cause No. NA 66-C-40.

Plaintiff asserts no independent claim against the State of Indiana or Soil Systems of Indiana; rather, their liability is premised solely upon the State's lease of the tract from the United States, and Soil System's apparent contract with one of the defendants. Clearly, no claim is stated, and all defendants are entitled to dismissal.

Based upon the foregoing, defendant United States of America's Motion to Dismiss is GRANTED.

DATED this 16th day of July, 1980

James E. Noland
U.S. District Judge

SUPREME COURT OF THE UNITED STATES

No. A-106

DOROTHY COLE,

Petitioner

V.

UNITED STATES, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 18, 1981.

/s/ John Paul Stevens

Associate Justice of the Supreme Court of the United States

Dated this 6th

day of August, 1981

APPENDIX "G"

Opposition

Office - Supreme Court, U.S.
FILED
NOV 3 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-569

In the Supreme Court of the United States

OCTOBER TERM, 1981

DOROTHY COLE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-569

DOROTHY COLE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that her state court trespass action brought against the United States was improperly dismissed after it was removed to federal district court. The trespass action, brought as a collateral challenge to a final and valid federal condemnation proceeding, was properly dismissed and presents no issue necessitating Supreme Court review.

1. On June 2, 1966, the United States commenced a condemnation proceeding to acquire several parcels of land in Crawford and Harrison Counties, Indiana, as part of the Cannelton Lock and Dam Project on the Ohio River. With its complaint, the government filed a declaration of taking pursuant to 40 U.S.C. 258a and deposited with the clerk of the court a sum of money representing estimated just compensation. The court ordered that immediate possession of the land be given to the United States. Petitioner and her

husband, the previous owners of one of the parcels of land so acquired, made no objection to the taking but requested a jury trial on the issue of just compensation. After a jury trial on that issue, the district court entered a judgment for the petitioner and her husband in the amount of $2,100. No appeal was taken from the judgment.

Over the following years, petitioner attempted, on various occasions, to interfere with the government's possession of the land (Pet. App. C). The United States sought and was granted several writs of assistance by the district court to gain access to the land, and two contempt citations were issued against the petitioner. On May 12, 1980, the petitioner filed this trespass action in state court, seeking to enjoin the United States from entering the land taken in 1966.

Shortly after the suit was filed, the government petitioned the United States District Court to remove the suit to that court (Pet. App. B). The government simultaneously moved to dismiss the suit, and sought a contempt citation in the original condemnation proceeding. Although counsel for petitioner entered his appearance in federal court, no response to the various government motions was made. On May 20, 1980, the district court removed the state trespass action to federal court, and on July 16, 1980 granted the government's motion to dismiss (Pet. App. F). As part of that order, the court found the government to be the sole and exclusive owner of the disputed land and enjoined petitioner from interfering with the government's possession of the property. The petitioner filed a notice of appeal and again sought to press her suit in state court. On July 30, 1980, petitioner filed a motion for an order staying execution of the district court's judgment pending the decision of the state court. This motion was denied on August 20, 1980.

On March 11, 1981, the court of appeals affirmed the judgment of the district court (Pet. App. C). The court of appeals found that since the state suit alleged that the government's actions violated the United States Constitution, 28 U.S.C. 1441 permitted removal of the litigation to federal district court. The court also found that since the United States had not waived its sovereign immunity to petitioner's trespass action, it was properly dismissed. The court finally concluded that the district court's injunction against petitioner's further interference with the United States' possession of the land was proper under the All Writs Act, 28 U.S.C. 1651(a), as action calculated to preserve and protect the prior condemnation judgment.

2. Petitioner contends that "the holdings of the U.S. District Court for the Southern District of Indiana and the U.S. Court of Appeals for the Seventh Circuit herein have preempted and forever barred the right reserved to States to initially interpret State Statutes" (Pet. 2). The federal power of eminent domain, however, cannot be infringed by the States. See *United States* v. *93.970 Acres of Land*, 360 U.S. 328, 332-333 (1959). Petitioner's state court litigation, furthermore, was properly removed to federal court. 28 U.S.C. 1441(b) provides for removal of civil actions "founded on a claim or right arising under the Constitution, treaties or laws of the United States." As noted by the circuit court, petitioner's state court pleadings asserted that the government's actions were not "in accordance with the 17th clause of the 8th section of the First Article of the Constitution of the United States" (Pet. App. C). The court below properly concluded that "[b]ecause the United States Constitution is invoked there can be no question that section 1441(b) permitted removal" (*ibid.*).[1]

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[1]Petitioner's suit also implicitly questioned the validity of a condemnation proceeding instituted under the laws of the United States, further bolstering the conclusion that 28 U.S.C. 1441(b) removal was proper.

Once removed to federal court, the suit was properly dismissed as it was barred by sovereign immunity. Suits against the United States can only be maintained with its consent. *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). As the court of appeals reasoned, "[w]e know of no statute by which state courts have authority to adjudicate claims of trespass against the United States. Congress has not agreed that the United States or its officers may be sued over a claim of that nature" (Pet. App. C).[2]

3. Petitioner's state court trespass action is an attempt to relitigate a matter already decided in the condemnation proceeding instituted by the United States in 1966. Petitioner's collateral attack on the sovereign authority of the United States to condemn land for public use was properly rebuffed.

The United States has inherent authority to condemn lands for public use, so long as the object for which the land is sought "is within the authority of Congress * * *." *Berman* v. *Parker*, 348 U.S. 26, 33 (1954); see also *United States ex rel. TVA.* v. *Welch*, 327 U.S. 546, 552 (1946). The United States' only obligation in connection with an authorized taking is to pay just compensation for the land taken. *Almota Farmers Elevator & Warehouse Co.* v. *United States*, 409 U.S. 470, 473 (1973).

The United States was clearly authorized to condemn petitioner's land. This Court has stated that "[s]ubject to specific constitutional limitations, when the legislature has

---

[2]Petitioner does not dispute the finding of the court of appeals that the Quiet Title Act, 28 U.S.C. 2409a, is not at issue in these proceedings. Among other obstacles, any action invoking the statute must be filed in federal court (*California* v. *Arizona*, 440 U.S. 59, 66-68 (1979)) and removal of a State court suit cannot cure that defect. See, *e.g.*, *Minnesota* v. *United States*, 305 U.S. 382, 388-389 (1939). In any event, such an action was barred by the statute of limitations. 28 U.S.C. 2409a(f).

spoken, the public interest has been declared in terms well-nigh conclusive." *Berman* v. *Parker, supra,* 348 U.S. at 32. The declaration of taking of petitioner's property, filed on June 2, 1966, recited that the property was taken for the Cannelton Lock and Dam Project, a project to improve navigation on the Ohio River, and relied on four statutes as authority for the taking.[3] The government, furthermore, remitted just compensation to petitioner following a jury trial in which she participated. Petitioner is properly bound by the judgment in that proceeding and cannot now argue she was denied due process or that her rights were violated.[4]

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[3]Act of Apr. 24, 1888, ch. 194, 25 Stat. 94, 33 U.S.C. 591; Act of Mar. 3, 1909, ch. 264, 35 Stat. 815; Act of Feb. 26, 1931, ch. 307, Section 1, 45 Stat. 1421, 40 U.S.C. 258a; Act of Oct. 28, 1965, Pub. L. No. 89-299, 89 Stat. 1096.

[4]Inexplicably, petitioner alleges that " 'The Record' below is devoid of any semblance of Due Process"(Pet. 12). Due process requires notice and an opportunity to be heard. *Fuentes* v. *Shevin,* 407 U.S. 67, 80 (1972). Petitioner received due notice of the government's motions to transfer and dismiss her state court action. Counsel for petitioner made an appearance in federal court, but did not otherwise respond to the government's motions, thus waiving petitioner's right to be heard. As for the underlying condemnation proceeding, the United States served notice on the petitioner of its intent to take her property, and petitioner was afforded an opportunity to challenge the estimated compensation figure offered by the United States. The petitioner took an active role in the jury valuation proceedings, including presenting evidence as to the value of her property. When judgment was entered on the award made by the jury, the petitioner did not take an appeal or otherwise object. Petitioner's due process arguments are therefore frivolous.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

ANNE S. ALMY
MARIA A. IIZUKA
Attorneys

NOVEMBER 1981

DOJ-1981-11